72-1054

FILE COPY

FILED

JAN 30 1973

MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1054

TYLER JUNIOR COLLEGE, HARRY E. JENKINS, EDWARD M. POTTER AND EDWIN E. FOWLER,

Petitioners,

v.

JOE RICHARD LANSDALE, PAUL HARDEN AND L. H. HUTCHINSON, JR.,

Respondents.

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

WILLIAM S. REEVES,
204 East Texas Savings Building,
Tyler, Texas 75701,
Attorney for Petitioners.

Of Counsel:
REEVES & REEVES

SOUTHWESTERN LAW PRESS — DALLAS, TEXAS — (214) 742-3985

TABLE OF CONTENTS

	Page
The Opinions Below	2
Jurisdiction of the Court	2
Questions Presented for Review	3
Constitutional Provisions and Regulation Involved in Case	3
Statement of the Case	4
Reasons for Granting the Petition	6
1. The Court of Appeals has decided a federal question of substance in a way which conflicts with decisions of the Court of Appeals for the Ninth and Tenth Courts of Appeals on the same matter	6
2. The Court of Appeals has arbitrarily entered a legislative judgment declaring, as a matter of law, that the constitutionality of a hair regulation is dependent upon a line arbitrarily drawn "between the high school door and the college gate", and that a hair regulation applicable to male students attending a junior college violates the Due Process and Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States	10
Conclusion and Prayer	14
Certificate of Service	15
Appendix	

Cases Page

American Bar Association Journal, Volume 58, page 752, July, 1972 9

Epperson v. Arkansas, 393 U.S. 97 (1968) 14

Freeman v. Flake, 10 Cir., 448 F. 2d 258, cert. den., 40 U.S.L.W. 3468 ..... 7, 9

Karr v. Schmidt, 5 Cir. 460 F. 2d 609 ..... 10, 11, 13

King v. Saddle Back Junior College District, 9 Cir., 445 F. 2d 932 7

Knetsch v. United States, 364 U.S. 361 (1960) 9

Massachusetts Trustees of Eastern Gas and Fuel Assn. v. United States, 377 U.S. 235 (1964) 9

Waterman Steamship Corporation v. United States, 381 U.S. 252 (1965) 9

Statutes

28 U.S.C.A. 1254 (1) 2

28 U.S.C.A. 1343 4

42 U.S.C.A. 1983 4

In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

TYLER JUNIOR COLLEGE, HARRY E. JENKINS, EDWARD M. POTTER AND EDWIN E. FOWLER,

Petitioners,

v.

JOE RICHARD LANSDALE, PAUL HARDEN AND L. H. HUTCHINSON, JR.,

Respondents.

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

To the Honorable Supreme Court of the United States:

Come now Tyler Junior College, Harry E. Jenkins, Edward M. Potter and Edwin E. Fowler, as Petitioners, and respectfully pray that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered on October 4, 1972, in this cause, in a class action [F.R. Civ. P. 23(a)(3)] brought under 42 U.S.C.A. Sec. 1983 and 28 U.S.C.A. Sec. 1343, seeking to enjoin the

operation and enforcement of a regulation of the length of hair to be worn by male students attending Tyler Junior College, under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. The injunctive relief was granted and the Court of Appeals, after hearing the case en banc, affirmed on October 4, 1972, by a vote of nine to six. As grounds for granting their Petition, Petitioners would respectfully show the Court as follows:

THE OPINIONS BELOW

The majority of the Court of Appeals rendered six opinions, and the minority rendered two opinions. The opinions have not yet been reported. They are reproduced in full as Appendix A, *infra.*

The opinion of the District Court is reported in 318 F. Supp. 529, and it is reproduced as Appendix B, *infra.*

JURISDICTION OF THE COURT

The judgment of the Court of Appeals has not yet been entered.

The Court of Appeals extended the time for filing a Petition for Rehearing until October 25, 1972.

A Petition for Rehearing was timely filed on October 19, 1972. It was entertained by the Court of Appeals and denied by Order, dated November 7, 1972, which is reproduced as Appendix C, *infra.*

Jurisdiction of this Court is invoked under 28 U.S.C.A. Sec. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether the complaint in this case fails to state a claim for which relief can be granted in that it merely alleges the constitutional invalidity of a hair and grooming regulation.

2. Whether a substantial constitutional question is presented in a case involving a regulation of a state junior college prescribing the length and style of hair to be worn by male students.

3. Whether the rights of male students at a state junior college under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States are, as a matter of law, violated by the promulgation and enforcement of a regulation prescribing the length and style of hair they may wear.

4. Whether a court may arbitrarily enter a legislative judgment declaring, as a matter of law, that the unconstitutionality of of a hair regulation is dependent upon a line arbitrarily drawn between high schools and junior colleges and violates the Due Process and Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States.

5. Whether the burden rests with the plaintiffs in a haircut case to allege and prove that the regulation of the length or style of a student's hair is arbitrary and has no reasonable relationship to the educational processes.

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED IN CASE

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

"* * * nor shall any State deprive any person of life,

> liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *"

The Regulation adopted by Tyler Junior College District reads in pertinent part as follows:

> "Extreme hair styles are prohibited. The hair in front should not cover the eyebrows. The hair must be kept neatly trimmed around the ears and must be above the collar. Beards are prohibited. Sideburns may be worn no longer than the bottom of the ear lobe. Mustaches, if worn, must be neatly trimmed so as not to extend below or beyond the upper lip." (R. 128; Plaintiffs' Exhibit No. 1.)*

STATEMENT OF THE CASE

This is a long hair or haircut case brought by Respondents, two teenage students and a twenty-two year old student, under 42 U.S.C.A. Sec. 1983 and 28 U.S.C.A. Sec. 1343 (R. 8.), as a class action, to declare a section of the "Dress Code" applicable to male students attending Tyler Junior College, a state institution, to be unconstitutional as a deprivation of the rights of Respondents and others similarly situated, under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and for a permanent injunction enjoining Petitioners from enforcing such Regulation. (R.4.)

A temporary restraining order was issued without notice on August 27, 1970, enjoining Petitioners from "interfering with or refusing to allow Plaintiffs and all other persons similarly situated to register, enroll and attend classes at Tyler Junior College." (R. 12.)

---

* All "R." references are to the Record in the Court of Appeals.

On September 1, 1970, the District Court granted a temporary injunction. (R. 271-276.)

Petitioners contended upon the Motion for Permanent Injunction that the Regulation in question did not violate any right of the Plaintiffs protected by the Constitution of the United States. (R. 66.)

After the District Court heard extensive evidence, a judgment granting a permanent injunction was signed and entered on April 9, 1971. (R. 108-109.)

The Regulation at issue had been in force at Tyler Junior College for a number of years. (R. 153-154, 227-228, 241.) Until the fall semester in 1970, there were no male students attending Tyler Junior College with hair longer than that prescribed by the Regulation. (R. 227-228, 229, 463.) The Respondents did not claim they did not know of the rule or that they did not understand it. No claim was made of any racial or religious discrimination. The Regulation has been uniformly applied and enforced. (R. 200.)

The case on appeal was heard by the Court of Appeals, sitting en banc, without oral argument. On October 4, 1972, the Court of Appeals rendered its opinion affirming the judgment of the District Court by a decision of nine to six, holding that the Regulation violates the Due Process and Equal Protection Provisions of the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals ruled, as a matter of law, that "the college campus marks the appropriate boundary where the public institution can no longer assert that the regulation of this liberty is reasonably related to the fostering or

encouragement of education." (App. A 4.) The Court of Appeals further said, "the majority holds today that as a matter of law the college campus is the line of demarcation where the weight of the student's maturity, as compared with the institution's modified role in his education, tips the scales in favor of the individual and marks the boundary of the area within which a student's hirsute adornment becomes constitutionally irrelevant to the pursuit of educational activities." (App. A-8.)

The Court of Appeals further arbitrarily held that the place where the line of permissible hair style regulation is drawn is between the high school door and college gate. (App. A-7.)

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals has decided a federal question of substance in a way which conflicts with decisions of the Courts of Appeals for the Ninth and Tenth Courts of Appeals on the same matter.

The Court of Appeals for the Fifth Circuit has here held, as a matter of law, it is constitutionally impermissible for a state junior college to adopt and enforce a regulation prescribing the length or grooming or style of a male student's hair, in the absence of proof of the existence of unusual conditions. It has determined, as a matter of law, that "the college campus marks the appropriate boundary where the public institution can no longer assert that the regulation of" the liberty of wearing hair as a student desires "is reasonably related to the fostering or encouragement of education." By so holding, the Court has said that a substantial constitutional question is present when a public college adopts and attempts to enforce a hair styling regulation.

A recent decision of Court of Appeals for the Ninth Circuit holds that federal courts are not required to entertain haircut cases and that such cases are not cognizable in federal courts. *King v. Saddle Back Junior College District,* 9 Cir., 445 F. 2d 932.

In *King, supra,* a junior college case, the Court held there was no substantial constitutional question presented, saying:

> "This is not a question of preference for or against certain male hair styles or the length to which persons desire to wear their hair. This court could care less. It is a question of the right of school authorities to develop a code of dress and conduct best conducive to the fulfillment of their responsibility to educate, and to do it without unconstitutionally infringing upon the rights of those who must live under it. We do not believe that the plaintiffs have established the existence of any substantial right which is in these two instances being infringed. We are satisfied that the school authorities have acted with consideration for the rights and feelings of their students and have enacted their codes, including the ones in question here, in the best interests of the educational process. A court might disagree with their professional judgment, but it should not take over the operation of their schools."

The judgment of the trial court granting an injunction was reversed.

In *Freeman v. Flake,* 10 Cir., 448 F. 2d 258, *cert. den.,* 40 U.S.L.W. 3468, the Court of Appeals for the Tenth Circuit said:

> "We are convinced that the United States Constitution and statutes do not impose on the federal courts the duty and responsibility of supervising the length of a student's hair. The problem if it exists, is one for the states and should be handled through state procedures. * * *
>
> "We doubt the applicability of the test of reasonableness

in the determination of the nebulous constitutional rights here asserted. The issue should not turn on views of a federal judge relating to the wisdom or necessity of a school regulation controlling the length of hair worn by a male student in a state public school. In Ferguson v. Skrupa, 372 U.S. 726, 730, the Court said that the courts will not 'substitute their social and economic beliefs for the judgment of legislative bodies.' The same principle is pertinent to dress codes of school boards. * * *

"The remedy provided by Section 1983 is supplementary to any pertinent state remedy. See Monroe v. Pape, 365 U.S. 167, 183. The proliferation of litigation resulting from the expanded use of Section 1983 is apparent to anyone familiar with the reported decisions of the courts of the United States. The existence of the Section 1983 remedy does not require that federal courts entertain all suits in which unconstitutional deprivations are asserted. A federal constitutional question must exist 'not in mere form but in substance, and not in mere assertion, but in essence and effect.' Cuyahoga River Power Co. v. Northern Ohio Traction & Light Co., 252 U.S. 388, 397.

"The states have a compelling interest in the education of their children. The states, acting through their school authorities and their courts, should determine what, if any hair regulation is necessary to the management of their schools. * * *

"Whether the allegations of a complaint state a claim for relief is a question of law. Bell v. Hood, 327 U.S. 678, 682. Complaints which are based on nothing more than school regulations of the length of a male student's hair do not 'seem directly and sharply implicate basic constitutional values' and are not cognizable in federal courts under the principles stated in Epperson v. Arkansas. It follows that each of the complaints with which we are concerned should have been dismissed for failure to state a claim on which relief can be granted."

Although *Freeman* apparently involved high school students,

there is no reason why the rationale of the case should not be applied to a case involving college students.

It goes without saying that one of the purposes of this Court in reviewing a case is to settle the law as it should be applied in the federal courts throughout the United States. It is a responsibility of this Court to insure that constitutional questions are uniformly determined. As has been noted in the *American Bar Association Journal*, Volume 58, page 752, July, 1972, there have been many lawsuits commenced in federal courts attacking the constitutionality of haircut regulations of public school authorities. It is there pointed out that "the decisions vary almost as widely as the controversial hair styles." It has been judicially stated that the "regulation of hair styles of male students in state public schools is becoming a matter of major concern to federal courts if one is to judge by the ever-increasing litigation on the subject or by the days of court time expended, and the lengthy briefs presented, in the cases now before us." *Freeman v. Flake, supra.*

This Honorable Court has held that the pendency of a considerable number of suits which would turn on the resolution of issues and the conflict among circuits as to an issue compel it to grant certiorari. *Massachusetts Trustees of Eastern Gas and Fuel Assn. v. United States*, 377 U.S. 235 (1964); *Waterman Steamship Corporation v. United States*, 381 U.S. 252 (1965); and *Knetsch v. United States*, 364 U.S. 361 (1960).

This Court should take jurisdiction of this case and decide the issue with reference to whether a substantial constitutional question exists where the authorities of a state college have adopted and propose to enforce a hair styling regulation ap-

plicable to its male students. The same rule of law should be applicable to a student attending a junior college in California and a student attending a junior college in Texas or any other State.

2. The Court of Appeals has arbitrarily entered a legislative judgment declaring, as a matter of law, that the constitutionality of a hair regulation is dependent upon a line arbitrarily drawn "between the high school door and the college gate", and that a hair regulation applicable to male students attending a junior college violates the Due Process and Equal Protection provisions of the Fourteenth Amendment to the Constitution of the United States.

In *Karr v. Schmidt*, 5 Cir., 460 F. 2d 609 (en banc 1972), which involved a hair regulation applicable to high school students, the Court held (1) a student's asserted right to be free of school regulations governing the length of his hair is not cognizable in federal courts and the case should be dismissed for failure to state a claim for which relief can be granted, (2) there is no constitutionally protected right for one to wear his hair in a public school the length and style that suits him, (3) there is a very strong policy to give local school boards the widest possible latitude in the management of school affairs, (4) the burden is not upon the state to establish the rationality of its restriction, but is upon the challenger to show that the restriction is wholly arbitrary, (5) in cases of such character, the standard of review is to determine whether a given regulation is reasonably intended to accomplish a constitutionally permissible state objective, (6) the question of the validity of a hair regulation should not turn upon the views of the district judges concerning the reasonableness of the regulation, and (7) that "where a complaint merely alleges the constitutional invalidity

of a high school hair and grooming regulation, the district courts are directed to grant an immediate motion to dismiss for failure to state a claim for which relief can be granted." The Court then said:

> "In conclusion, we emphasize that our decision today evinces not the slightest indifference to the personal rights asserted by Chesley Karr and other young people. Rather, it reflects recognition of the inescapable fact that neither the Constitution nor the federal judiciary it created were conceived to be keepers of the national conscience in every matter great and small. The regulations which impinge on our daily affairs are legion. Many of them are more intrusive and tenuous than the one involved here. The federal judiciary has urgent tasks to perform, and to be able to perform them we must recognize the physical impossibility that less than a thousand of us could ever enjoin a uniform concept of equal protection or due process on every American in every facet of his daily life."

The Court of Appeals for the Fifth Circuit in *Karr, supra,* page 19, pointed out that grooming regulations must not be wholly arbitrary and that federal courts would still entertain actions alleging discriminatory enforcement of grooming codes; but it cited *Freeman, supra,* for the proposition that where a complaint alleged nothing more than school regulations of the length of a male student's hair, they are not cognizable in federal courts and should be dismissed for failure to state a claim on which relief could be granted. It is odd to note that in the same connection, the Court also cited *King, supra,* with approval.

If a complaint alleging the constitutional invalidity of a hair and grooming regulation applicable to an eighteen year old high school student should be dismissed for failure to state a claim for which relief can be granted, then how does one distinguish

such a case from a hair and grooming regulation which is applicable to an eighteen year old college student? The observation of Circuit Judge Roney in this case that he could see no distinction between a high school student and a college student points up the principle that the Court of Appeals for the Fifth Circuit has arbitrarily and without any basis in authority held that two principles of law should be applied to hair grooming cases, one of which is that a high school student has no constitutionally protected right to wear his hair as he chooses, and the other of which is that a college student does have such a right. On principle, the rule of law should be the same.

The majority opinion in this case acknowledges that the line being drawn by it between a college campus and a high school may be attacked as being arbitrary. The majority opinion recognizes that a student may one week be enrolled in high school and the next week be enrolled in college. It is obvious that the opinion is justifiably subject to such an attack.

One of the concurring opinions recognizes that the decision of the majority is a legislative judgment. Circuit Judge Bell said:

> "A legislative judgment of the kind involved here is inescapable for the court, given civil rights jurisdiction, 42 U.S.C.A. Sec. 1983, the inability to require exhaustion of state remedies, *Monroe v. Pape*, 365 U.S. 167 (1961), and the class action rule, Rule 23, F.R. Civ. Procedure."

In another concurring opinion, four of the Circuit Judges agreed that the majority opinion makes "constitutional consequences dependent upon a line arbitrarily drawn between high schools and junior colleges." These same four Circuit Judges further weakened the position of the majority by writing:

> "This Court en banc strained mightily and conscientiously over these two cases. The net result of the effort is unfortunately not a glorious one. Our stance as a Court emerges as unsatisfactory — because it is arbitrary and inconsistent — to members of the Court with directly opposing views."

What the Court of Appeals for the Fifth Circuit said in *Karr, supra,* in all logic and reason is equally applicable to this case. There is no distinction to be made on principle, on logic, or on reasoning between a rule of law applicable to high schools and one applicable to junior colleges.

As was pointed out by the minority in this case, the Court held in *Karr, supra,* that a substantial constitutional question was not presented in a haircut case. The minority point out that such a statement was made five times in the course of the opinion in *Karr.*

The Court has simply reached a decision upon a constitutional question, which is not based upon authority, which is contrary to the rationale and judgment in *Karr, supra,* and which is legislative in character. The majority in this case fail to discuss the problem of federal intervention in the control of state schools in the absence of a direct and positive command to be found in the Federal Constitution. They just arbitrarily draw a line and place a high school student on one side of it and a college student on the other. If there is no constitutionally protected right for a high school student to wear his hair in the length and style he chooses, there is even greater reason to hold that such right is absent in respect to a college student. The high school student is compelled to attend school. No student is compelled to attend Tyler Junior College.

The paramount question involved in this case is the right of college authorities to adopt a regulation governing the appearance of students best conducive to the discharge of their duty to educate without infringing upon the rights of a student in an unconstitutional manner. There is no evidence in this case which demonstrates the existence of a substantial constitutional right which would be infringed by the enforcement of the regulation. The record does demonstrate that the college authorities have acted in the best interests of the educational process. Public education in the United States is committed, as this Court has held, to the State and local authorities. *Epperson v. Arkansas*, 393 U.S. 97 (1968). The federal judiciary should not interfere with the day-to-day operation of the public school system, a part of which is the system of junior colleges in Texas. We submit that except in extreme cases, which is not demonstrated by the record in this case, the judgment of the college authorities should be final in applying regulations to individual cases.

CONCLUSION AND PRAYER

It might be said that the Supreme Court has far more important questions presented to it than to determine whether a substantial federal constitutional question is presented in a haircut case. This Court does have many grave questions presented to it, which vitally affect large numbers of the citizens of this Country. We suggest, however, that the principles involved in this case are important. The right of local authorities to promulgate rules for the operation of the colleges of this Country is of extreme importance. Public education should be committed to the control of local authorities. It is not in the interest of jurisprudence that this Court permit the decision of

the Court of Appeals, which is admittedly legislative in character, which is admittedly arbitrary, and which has admittedly been rendered without any basis in law, to be the law in the Fifth Circuit.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that this Petition for Writ of Certiorari be granted, and, upon final hearing, that the judgments of the Court of Appeals and the District Court be reversed and this cause ordered to be dismissed.

Respectfully submitted,

William S. Reeves

WILLIAM S. REEVES,
204 East Texas Savings Building,
Tyler, Texas 75701,
Attorney for Petitioners.

Of Counsel:
REEVES & REEVES
204 East Texas Savings Bldg.
Tyler, Texas 75701

CERTIFICATE OF SERVICE

It is hereby certified that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari were served upon counsel for Respondents by placing the same in the United States Post Office, first class postage prepaid, and properly addressed to counsel of record, Mr. William H. Kugle, Jr., P. O. Box 152, Athens, Texas 75751, on the 27th day of January, 1973.

William S. Reeves

William S. Reeves

APPENDIX

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1775

JOE RICHARD LANSDALE, et al.,
Plaintiffs-Appellees,

v.

TYLER JUNIOR COLLEGE, HARRY E. JENKINS, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Texas

(October 4, 1972)

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

CLARK, Circuit Judge, with whom MORGAN, Circuit Judge, joins: Joe Richard Lansdale and two other young men attempted to register for the Fall 1970 Semester at Tyler Junior College, a public institution of the State of Texas. However, because their hair styles did not conform to a particular section

of the "Dress Code," a comprehensive set of regulations governing student appearance adopted by the Board of Trustees shortly before the school term, they were not permitted to register. Subsequently, they brought suit in the court below, under 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1343, seeking to enjoin the operation and enforcement of the pertinent regulation against themselves and others similarly situated. Fed. R. Civ. P. 23(a)(3). They alleged, *inter alia*, that the enforcement of the regulation by college officials was arbitrary, unreasonable, and a violation of their right to equal protection of the laws guaranteed by the Fourteenth Amendment. The district judge granted the permanent injunctive relief prayed for. The college appeals. For the various reasons stated in separate concurring opinions, a majority of the court affirms.

Objectively viewed, there are few, if any, fundamental factual distinctions among the individual circumstances of each of the tens of thousands of college students on the hundreds of campuses in this circuit which should affect their respective constitutional statuses vis-a-vis the regulations of the educational institution in which they are enrolled. Thus, the part of Lansdale's collegiate life which can be constitutionally controlled by administrative edict would not be remarkably different if he were enrolled in any other junior or senior college in any other state. In like manner, students enrolled in a myriad of public school institutions in this circuit are, for any conceivable "Dress Code" regulatory purposes, similarly situated.[1]

[1] For example, we noted in Karr v. Schmidt, 460 F. 2d 609 (5th Cir. en banc 1972), that Karr's high school situation in El Paso, Texas was substantially the same for constitutional purposes as that of his counterparts in Hillsborough County, Florida and Pampa, Texas.

In the ultimate analysis, this sameness of the campus life in the respective grade and high school and collegiate environments means that judicial scrutiny of haircut regulations in these institutions almost never calls for what is truly an adjudication of facts. Except in a relative handful of cases where unique situations exist, it is a delusion and a pretense to imagine that the decision in hair length regulation cases can be based upon an objective determination gleaned from testimony by administrators, students or experts. Pragmatically and realistically, the result of the process embodies a particular judge's subjective selection among what he views as competing values. On the one hand, he attaches his own weight of merit and importance to the personal liberty of the student to wear his hair as he wills; then, on the other hand, he assesses his notion of the importance or "relevance" of the authoritarian prerogatives which school administrators have asserted they must exercise to achieve the aims of the particular educational institution. The most important tenet in my reasoning is that the decision either that hair must be cut if the student is to continue his education at the school because the regulation is deemed reasonably related to a legitimate state interest, or that the school must strike the regulation from its records because it has no rational basis and therefore arbitrarily infringes a valid constitutionally protected liberty, is wrongly cast if put in the mold of a determination of fact from record evidence.

So long as these ad hoc appraisals continue, the only hope that both students and school officials who are identically situated will receive meaningful and consistent adjudications of their constitutional positions, lies in whatever compulsion for general

conformity that may fortuitously exist among independent life-tenured federal judges. This is too faint an anticipation to be acceptable. The Fourteenth Amendment guarantees to the student of equal protection and due process, and the Tenth Amendment freedom of the public official to operate the school entrusted to his care in the manner he determines best, free of federal intrusion, each merits more certainty in the law. This need for more uniform treatment of litigants whose fact situations are really identical led the majority of this court in *Karr* to conclude that a per se rule should be adopted in high school haircut regulation litigation. That rule states that no number of experts opining on the wisdom or folly of such regulations, and no volume of student, parent or school board testimony as to events or motive should provoke a decision voiding a non-arbitrary regulation of hair length on constitutional grounds. Today's case asks that we extend the scope of that per se rule to the college campus. I refuse to do so, not because the college student has constitutional rights which his lesser-educated counterpart lacks, but because as a matter of law the college campus marks the appropriate boundary where the public institution can no longer assert that the regulation of this liberty is reasonably related to the fostering or encouragement of education. The value of the liberty hasn't changed, rather the setting in which it is to be exercised has.

Such line drawing may be attacked as arbitrary. Ofttimes three months, and sometimes only one week, separates the high school senior from the college freshman. It is likewise true that many high school students may find hair regulations so offensive as to prohibit their continued education, while an equal number

of college students couldn't care less. But these are not controlling principles. The redeeming virtue of a per se rule, which far outweighs its shortcomings, is that it is more realistic and more equitable in its overall operation than random judicial "fact" fiats that treat one student one way and another virtually identically circumstanced student another. By differentiating between grade and high schools on the one hand and colleges on the other, we bring to academic regulation of hair style as much order as the inherent vagaries of a system of judge-made law will permit.

Basic also to today's decision is the premise that the state has no total right to regulate hair styles, either in general or within the entire framework of public education. There comes a time when its interest in teaching hygiene, instilling discipline, asserting authority and compelling uniformity all become so tenuous as to no longer be reasonably related to, nor effectively fostered by, a haircut regulation.

There are a number of factors which support the proposition that the point between high school and college is the place where the line should be drawn — the place where "the Law stops and just people starts".[2] That place is the point in the student's process of maturity where he usually comes within the ambit of the Twenty-Sixth Amendment and the Selective Service Act, where he often leaves home for dormitory life, and where the educational institution ceases to deal with him through parents and guardians. From that day hence, only the presence of an unusual set of factors can justify regulating the length of his hair as a condition precedent to his right to continue to

[2] W. Faulkner, *The Reivers*.

avail himself of public educational opportunities. There may be an extraordinary case where facts really could be produced to demonstrate that hair fetishes had become so distracting as to prevent collegiate scholastics from the normal pursuit of their learnings. If it occurs and can be demonstrated, a different result would be warranted.

Today's decision should not be read as modifying the rationale of the majority opinion in *Karr*. *Karr* unqualifiedly includes the right of citizens to choose their mode of personal hair grooming within the great host of liberties protected by the Fourteenth Amendment from arbitrary state action. *Karr* nevertheless concludes that the regulation of that right by high school officials charged with the important state objective of educating young people, does not lack a rational basis in a high school setting and therefore does not deprive such students of due process of law.[3]

Thus, while we reaffirm that *Karr* is premised on an adjudication that the right of students to go into the world as they please is a constitutionally protected one, *Karr* is misinterpreted if it be read as providing that such a right is statically absolute throughout every educational experience. Of course it is not. Rather, like the measurement of time and space and like the even more explicit guarantees of the First Amendment, it must

[3] In acknowledging the strong dissent of the other judges who, as I, joined in *Karr v. Schmidt*, I feel compelled to note that I feel securely bolstered in my interpretation of that case by the joinder in this opinion of Judge Morgan, who was its author. In further response to the dissent's suggestion that this opinion is a *coup de main*, I would only observe that if *Karr* had been intended as a *coup de grace* to the very existence of a person's constitutional right to choose his hair style, it wasted a great deal of judicial powder in firing so simple a shot.

be relative. It functions in a variable equation, both with the need of the institution to regulate that right and with the maturity of the student involved.[4] What is emphasized in today's decision is that the extent to which it is reasonable to invade personal liberty by the adoption of a haircut regulation changes with true variations between educational situations and types of students. For example, a post-graduate college or adult education classroom is not the same as a kindergarten or a 9th grade homeroom, just as certainly as the 24-year-old post-grad is twice the age of the 12-year old sixth grader. The motives and motivations of each are entirely different. Today the court affirms that the adult's constitutional right to wear his hair as he chooses supersedes the State's right to intrude.[5] The place where the line of permissible hair style regulation is drawn is between the high school door and the college gate.

If we reviewed the fact findings made by the district judge in the case at bar, we would find them to be free from clear error. But such a procedure would suffer from the same deficit I percieve in all other such "fact" adjudications as to this type regulation. If the "facts" on both sides have been adequately developed, a decision either way would doubtless have to be affirmed under this standard of review. Fed. R. Civ. P. 52(a). Such variance in result is precisely what the rule of law we apply seeks to end. To avoid the erratic ad hoc results which either the varying abilities of individual parties to produce "proof" or the predilections of different district judges could impose on students and school officials otherwise similarly situ-

---

[4] *Cf.* Weber v. Aetna Casualty & Surety Co., ... U.S. ....., 92 S. Ct. 1400, ... L. Ed. 2d ..... (Part II).

[5] See *Karr, n.* 13.

ated, the majority holds today that as a matter of law the college campus is the line of demarcation where the weight of the student's maturity, as compared with the institution's modified role in his education, tips the scales in favor of the individual and marks the boundary of the area within which a student's hirsute adornment becomes constitutionally irrelevant to the pursuit of educational activities.

In the absence of a showing that unusual conditions exist, the regulation of the length or style of a college student's hair is irrelevant to any legitimate college administrative interests and any such regulation creates an arbitrary classification of college students. Because no such unusual circumstances existed here, the regulation adopted in the instant case violates both the due process and equal protection provisions of the Fourteenth Amendment to the Constitution of the United States. The decision of the district court permanently enjoining the enforcement of a haircut regulation by Tyler Junior College is

AFFIRMED.

BROWN, Chief Judge, concurring:

I concur in the result and in much of Judge Clark's able opinion. I would join also in Judge Wisdom's concurrence and all of that of Judge Simpson's save where he embraces completely Judge Tuttle's concurrence in *Sherling v. Townley*, 5 Cir., 1972, ... F. 2d ..... [No. 71-1474, July 25, 1972] which, to me, in a reverse way is subject to the same deficiency as *Karr* with its *per se* rule — one for, one against hair restrictions.

I think Judge Clark for the Court has bravely revealed the

shortcomings of our vaunted case-and-controversy system with its insatiable demand for record facts. As he wisely points out, when all is said and done, these decisions do not — and it would be a dangerous thing if they did — turn on the presence or absence of word testimony from administrators, school boards, freedom militants or variations in between as to the consequences in order, discipline, learning environment and the like flowing from the cosmetic factor of hair. For this testimony — pro and con — is freely available with none of the restraints of perjury, and in the last analysis the Judge picks and chooses, not because one is more, or less, creditable than the other, but simply because the one rather than the other comes closest to the Judge's notion of what the law demands or tolerates.

Indeed, except for one limited dissent in *Karr*, the position of the majority was not on the factual record. It was on the idea that the state could regulate, with no indicated justification, the length of hair.

This is no apologia for the system. It is a recognition of fact. And for a calling already full of its own myths and the expectation that our Commission somehow invests us with a prescience given to no other men, it is good for us to acknowledge our limitations and the occasional inadequacy of our system to honestly articulate the distinctions in judgment.

My slight difference is that while recognizing these influences leading Judges to decision, it seems a contradiction to cast it in terms of *per se*. For by sheer numbers, that is to aggregate the individualized judicial hunches into something that, genie-like, is a principle of law. See Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, 1929, 14 Corn.

L.Q. 274. Except for this I concur in the opinion and certainly the result.

WISDOM, Circuit Judge, with whom Chief Judge BROWN and GOLDBERG and THORNBERRY, Circuit Judges, join, specially concurring:

I concur in the result of this case because of the reasons I expressed in my dissenting opinion in *Karr v. Schmidt*, 5 Cir. 1972 (en banc) 460 F. 2d 609.

BELL, Circuit Judge, Specially Concurring:

I concur in the result of this case and in the principle which it sets out that is applicable to hair style regulations at the college level, a principle different from that applying below the college level. See *Karr v. Schmidt*, 5 Cir., 1972, 460 F. 2d 609 (En banc). A legislative judgment of the kind involved here is inescapable for the court, given civil rights jurisdiction, 42 USCA, § 1983, the inability to require exhaustion of state remedies, *Monroe v. Pape*, 365 U.S. 167 (1961), and the class action rule, Rule 23, F. R. Civ. Procedure.

GODBOLD, Circuit Judge, with whom THORNBERRY, Circuit Judge, joins, specially concurring:

I concur in the result of this case and in the principle which it sets out that is applicable to hair style regulations at the college level, a principle different from that applying below the college level. In *Karr v. Schmidt*, 460 F. 2d 609 (5th Cir. 1972) (en banc), I expressed my view regarding the correct

governing principle for hair and dress code regulations below the college level. I continue to adhere to that view.

SIMPSON, Circuit Judge, with whom WISDOM and GOLDBERG, Circuit Judges, join in whole and Chief Judge BROWN joins in part, concurring specially:

I concur in the result here reached by the Court for the cogent reasons expressed by Judge Wisdom in his dissent (which I joined) in *Karr v. Schmidt*, 5 Cir. 1972 en banc, 460 F. 2d 609 and further for the reasons recently well-stated by Judge Tuttle in his special concurrence in *Britt Sherling, a minor, etc. et al., v. Dr. John F. Townley, individually and as Superintendent of the Irving Independent School District, et al.*, 5 Cir. 1972), ... F. 2d ....., (No 71-1474, decided July 25, 1972).

I have as much difficulty as does Judge Dyer (see separate dissent, p. 13) in reconciling this decision with *Karr v. Schmidt*. I agree with him that the majority opinion here makes "constitutional consequences dependent upon a line arbitrarily drawn between high schools and junior colleges."

I think the constitutionally protected right of a 17 year old junior college freshman with respect to his choice of hair length may not be logically demonstrated to differ from that of a 17 or 18 year old high school junior or senior. To me this false dichotomy simply emphasizes the inherent fallacy of the majority position in *Karr v. Schmidt*. I would not, as would Judge Dyer, follow *Karr v. Schmidt*. I would repudiate it, and instead, as suggested by Judge Tuttle in *Sherling v. Townley*, supra, adopt

"a *per se* rule that no such regulation" (of hair length) "can stand under the equal protection provisions of the Fourteenth Amendment on the ground that such regulations create a classification of citizens totally unrelated to the objectives of the operation of high schools."[1]

This Court en banc strained mightily and conscientiously over these two cases. The net result of the effort is unfortunately not a glorious one. Our stance as a court emerges as unsatisfactory—because it is arbitrary and inconsistent — to members of the Court with directly opposing views. Surely these are grounds for re-examination of both decisions.

DYER, Circuit Judge, with whom GEWIN, COLEMAN, AINSWORTH and INGRAHAM, Circuit Judges, join, dissenting:

I dissent from the Court's conclusion that Lansdale has a Fourteenth Amendment right to wear his hair as long as he pleases, in violation of the College's "Dress Code." It has no authoritative support and, in my opinion, is contrary to the rationale of *Karr v. Schmidt*, 5 Cir. 1972, 460 F. 2d 609, [No. 31045, April 28, 1972] en banc.

In *Karr* we said no less than five times that a substantial constitutional question was not presented in a haircut case.

> Believing, as did Mr. Justice Black, that appellee Karr's asserted right to be free of school regulations governing the length of his hair is one that is not cognizable in federal courts, we reverse with direction that the case be dismissed for failure to state a claim

[1] And of course, junior and senior colleges and universities as well.

for which relief can be granted.

Id. at .....

> Is there a constitutionally protected right to wear one's hair in a public high school in the length and style that suits the wearer? We hold that no such right is to be found within the plain meaning of the Constitution.

Id. at .....

> It is our firm belief that this asserted freedom [to wear hair in school at the length that suits the student] does not rise to the level of fundamental significance which would warrant our recognition of such a substantive constitutional right.

Id. at .....

> * * * [O]ur holding [is] that there is no substantial constitutional right to wear hair in the fashion that suits the wearer * * *.

Id. at .....

> [Our decision] reflects recognition of the inescapable fact that neither the Constitution nor the federal judiciary it created were conceived to be keepers of the national conscience in any matter, great and small.

Id. at .....

What we said in *Karr* is equally applicable here. "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of

school systems and which do not *directly and sharply implicate basic constitutional values.*" (emphasis supplied) *Epperson v. Arkansas*, 1968, 393 U.S. 97, 104.

The Court is attempting to make law by a *coup de main* that articulates constitutional consequences dependent upon a line arbitrarily drawn between high schools and junior colleges in the face of contrary precedent.

RONEY, Circuit Judge, dissenting:

I dissent, first, because I see no distinction between high schools and junior colleges under the *Karr v. Schmidt* holding, which is now the law of this Circuit; and second, because I agree with the *Karr v. Schmidt* rationale except where school attendance is compelled by the state, which is not the case at Tyler Junior College.

In the

United States District Court

FOR THE EASTERN DISTRICT OF TEXAS

TYLER DIVISION

Civil Action No. 5201

JOE RICHARD LANSDALE, et al.,

v.

TYLER JUNIOR COLLEGE.

MEMORANDUM OPINION

The named plaintiffs are three long-haired young males who bring this suit to enjoin the operation and enforcement against them of a section of the "Dress Code", a comprehensive set of regulations governing the appearance of students which was adopted by the Tyler Junior College Board of Trustees shortly before the beginning of the 1970 Fall Semester. A temporary restraining order allowing plaintiffs to register was entered August 28, 1970, and a hearing on plaintiffs' motion for preliminary injunction was held September 1, 1970, the first day of the Fall Semester. The questioned regulation reads as follows:

> "Extreme hair styles are prohibited. The hair in front should not cover the eyebrows. The hair must be neatly trimmed around the ears and must be above the collar. Beards are prohibited. Side burns may be worn no longer than the bottom of the earlobe. Mustaches, if worn, must be neatly trimmed so as not to extend below or beyond the upper lip."

One of the named plaintiffs, age 22 and a Vietnam veteran, attended the 1969 Summer Session, 1970 Spring Semester, and the first semester of the 1970 Summer Session at Tyler Junior College. During his attendance, he was a "straight A" student whose conduct was never questioned by college authorities. At the hearing on plaintiffs' motion for preliminary injunction, his hair reached his shoulders. The hair of all the named plaintiffs, although long, appeared clean and neatly trimmed. Each named plaintiff gave fashion and personal expression as his justification for wearing long hair. They denied any religious, political or moral reasons for their deviation from the norm.

The named plaintiffs attempted to register at the announced time for the 1970 Fall Semester. Each named plaintiff was furnished with a copy of the Dress Code and informed by a college official that he could not register until his hair style conformed to the regulation. No other reason was given for refusal of registration. They apparently qualified, otherwise. The named plaintiffs later filed this suit, for themselves and others similarly situated, under the provisions of 42 U.S.C. 1983 and 28 U.S.C. 1343, alleging, *inter alia,* that the enforcement by college officials of such regulation against them was arbitrary and unreasonable and violated their constitutional rights. The point in issue is the applicability vel non of that portion of the

14th Amendment prescribing that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Initially, it must be recognized school officials are given wide discretion in formulating rules and regulations. *Burnside v. Byars,* 363 F. 2d 744 (5th Cir. 1966); *Ferrell v. Dallas Independent School Dist.,* 392 F. 2d 697 (5th Cir. 1968), *cert. den'd,* 393 U.S. 856 (1969). Specifically, the Texas Legislature has conferred upon the boards of trustees of junior college districts the exclusive power to manage and govern internal school affairs, including the authority to adopt such rules and regulations as they deem proper. *Texas Education Code,* Sections 51.073 and 23.26. This discretion, however, has been limited. In *West Virginia v. Barnett,* 319 U.S. 624, 637, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), the Supreme Court of the United States held:

> "The Fourteenth Amendment as now applied to the states protects the citizen against the state itself and all its creatures, boards of education not excepted. * * * That they are educating the young for citizenship is reason for scrupulous protection of the constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

In *Tinker v. Des Moines Independent School District,* 393 U.S. 503, 511, 89 S. Ct. 733, 21 L. Ed. 731 (1969), the Supreme Court referred to the rights of students:

> "In our system, state operated schools may not be enclaves of totalitarianism. School officials do not prossess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the

> state must respect, just as they themselves must respect their obligations to the state." 393 U.S. at 510.

Judge Lynne, in *Zachry v. Brown*, 299 F. Supp. 1360, 1362 (N.D. Ala. 1967), well summarized the case law on this subject:

> "The wide latitude permitted legislatures of the states and therefore the administrators of public colleges to classify students with respect to dress, appearance and behavior must be respected and preserved by the courts. However, the equal protection clause of the fourteenth amendment prohibits classification upon an unreasonable basis."

Tinker requires that the student-plaintiffs be regarded as "persons" under the Constitution. Certainly they are entitled to this status, for in the judgment of Congress and the President, as recently expressed in legislation, all males of the age of the two younger named plaintiffs are now deemed sufficiently mature to exercise the franchise, and have long been required to bear arms in defense of their country. As "persons", they may rightfully demand the same rights and privileges granted other persons under the Constitution. Specifically, they are entitled to question the reasonableness of any regulation directed toward them.

If this regulation involved some identifiable class other than allegedly disruptive students, its unreasonable and invidious character would be instantly apparent, especially to the affected class. To illustrate, if the Texas legislature were to be so unwise as to enact the questioned regulation into statutory form, making it applicable only to a single segment of the population — such as bankers, physicians, lawyers or construction workers — and barring violators from continued employment in their occupa-

tion, one can easily visualize the onrush to the courthouses of the state that would ensue.

Moreover, the converse of the regulation also demonstrates its basic lack of reasonableness.

> "The requirement that these plaintiffs cut their hair to conform to normal or conventional styles is just as unreasonable as would palpably be a requirement that all male students of the college wear their hair down over their ears and collars." *Zachry v. Brown*, supra, at 1362.

The right of students to the free choice of hair styles granted other citizens has been upheld in cases involving the First, Ninth, and Fourteenth Amendments. Regulations limiting students' rights in this particular can be validated only in instances where school officials can show a reasonable relationship between the forbidden style and the health, welfare, morals, and discipline of the student community. *Ferrell v. Dallas Independent School District*, supra; *Griffin v. Tatum*, 425 F. 2d 201 (5th Cir. 1970); *Stevenson v. Wheeler County School Board of Education*, 426 F. 2d 1154 (5th Cir. 1970); *Breen v. Kahl*, 419 F. 2d 1034 (7th Cir. 1970); *cert. den'd.*, 398 U.S. 937, ... S. Ct. ....., ... L. Ed. 2d ..... (1970); *Calbillo v. San Jacinto Junior College*, 305 F. Supp. 857 (S.D. Tex. 1969).

In *Griffin v. Tatum*, supra, at 203, the Court of Appeals for the Fifth Circuit said:

> "The touchstone for sustaining such regulations is the demonstration that they are necessary to alleviate interference with the educational process."

The college officials, as defendants, contended at the hearing that the regulation was essential for maintaining campus dis-

cipline and a proper, efficient and effective educational environment. Two defendants, the college president and the academic vice-president, referred during their testimony to educational conferences they had attended. They were informed by fellow academicians at the meetings that long-haired male students had been in the forefront of disruptions and disorders at their respective colleges. They also testified that they had viewed, on television, long-haired male college students participating in riots, marches, and confrontations with authorities, and that they had read about similar activities of such students in newspapers, educational journals, and other periodicals. A Tyler Junior College foreign language professor testified that long-haired male students caused disruptions in a class he had previously conducted at a North Carolina college. Each of these three testified that in his opinion the admission of long-haired male students to Tyler Junior College inevitably would result in similar disruptions. Their rationale apparently was that since long-haired students caused disruptions in other institutions of learnng, all long-haired male students are potential troublemakers.

I am unwilling to accept a syllogism so perverse and jejune as this to justify the humiliating and demeaning restrictions which this regulation would place on the plaintiffs. The foregoing testimony was directly contradicted by the unchallenged testimony of plaintiff Harders, the Vietnam veteran, who stated that his hair, which had not been cut since February 1970, was longer during the first semester of the 1970 Summer Session than prescribed by the regulation, and that his hair style provoked no disruptions of any type. The testimony also disclosed

that no substantial disruptions occurred after some freshmen football players were, in the past, compelled to wear "Mohawk" hair styles by upperclassmen. (This involved the shaving of the unfortunate's head in such manner as to leave only a strip of hair, extending across the crown of his head from the forehead to the nape of the neck.)

Furthermore, the defendants offered no evidence of scientific research or studies indicating that long-haired males necessarily are predisposed to violence. Indeed, it would be virtually impossible to establish such a proposition. I have before me the portraits of all signers of the Constitution of the United States, with the exception of Thomas Fitzsimmons. The vast political and philosophical differences which existed between such signers as James Madison, Alexander Hamilton, and Gouverneur Morris, as well as among other delegates to the constitutional convention, including George Washington and Benjamin Franklin, is well revealed in the accounts of the debates preceding the adoption of the Constitution. Yet, despite their dissimilarities, 37 of the 39 delegates to the constitutional convention displayed hair (or wig) styles which would offend the regulation in question. Moreover, such varied contemporaries of the delegates as Robespierre, the political terrorist, Napoleon Bonaparte, the militarist, William Blake, the gentle poet and artist, and Joseph Priestley, the eminent scientist, all wore their hair long. So it has been throughout history. In any given era, a society's greatest men and its blackest villains customarily have worn the same hair style affected by most males in their respective circumstances.

> "Mankind's experience has demonstrated that in this area of fashion, fads constantly come and go as the pendulum

> unceasingly swings from extreme to extreme." *Sims v. Colfax Community School District*, 307 F. Supp. 485, 489 (S.D. Iowa 1970).

I accept, therefore, the opinion of the plaintiff Hutchinson, who said:

> "I believe that my hair has nothing to do with my character, and that I am going to be the same person with or without long hair; * * * and this goes for any person, I think."

No evidence having been presented at the hearing which would justify the belief that an individual with long hair will change dramatically in character once his hair is shortened, I conclude that this regulation, which is designed to eliminate all male students with long hair as a deterrent to disruption, is unreasonable, discriminatory, and void.

The college officials' desire to maintain discipline and order is understandable and commendable. This, however, cannot be achieved by the wholesale elimination of select students who, hypothetically, may provoke disruptions. Undifferentiated and unrealized fears of this nature may not be used as the basis for denying constitutional rights. *Tinker v. Des Moines Independent School District*, supra; *Calbillo v. San Jacinto Junior College*, supra. The school officials may enforce rules and regulations which discipline individuals who, in fact, cause disorders and disrupt the school's educational environment. Such disciplinary regulations are suited for placing sanctions on the guilty. The regulation presently before this court, however, punishes the guilty and innocent alike.

The remaining question is whether the named plaintiffs may maintain this suit as a class action. The plaintiffs seek to repre-

sent all other persons similarly situated, all prospective students of Tyler Junior College, and all other persons who have been victims of the arbitrary and discriminatory actions of the defendant. Rule 23, F. R. Civ. P., covers class actions. It reads, in its pertinent part, as follows:

> "(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties will fairly and adequately protect the interests of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
> "(h) Class Actions Maintainable. An action may be maintained as a class action if the prerequisite of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> "(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief * * * with respect to the class as a whole * * *"

From the evidence submitted at the hearing, it may be deduced that about 40 students with long hair presented themselves for registration. All were turned away by the school authorities. It appears that some had their hair trimmed and were later allowed to register. The number of those denied admission who refused to comply with the regulation and registered at some other college or simply ended their pursuit of an education was not recorded nor was it revealed by the evidence. There was also no evidence as to the number of long-haired males who made no effort to register at Tyler Junior College because of

their knowledge of and opposition to the hair-styling regulation. Likewise, there is no way to ascertain how many long-haired males will desire to register at the college in the future. In fact, it is possible that numbers of persons yet unborn may be the beneficiaries of the decision made in this case.

It is obvious that the class which the named plaintiffs seek to represent is so numerous that joinder of all members is impracticable. Also, it is apparent that the question of the constitutionality of the regulation is common to the class, that the claims of the named plaintiffs are entirely typical of the class, and that they will fairly and adequately protect the interest of the class. Consequently, the named plaintiffs have met the requirements of subdivision (a). *Carpenter v. Davis,* 424 F. 2d 257 (5th Cir. 1970); *Broughton v. Brewer,* 298 F. Supp. 260 (S.D. Ala. 1969); *Snyder v. Board of Trustees,* 286 F. Supp. 927 (N.D. Ill. 1968).

Subdivision (b) (2) has reference to class actions brought to force or prevent action that really concerns members of the class individually. Cohn, "The New Federal Rules of Civil Procedure, 1966", 54 Georgetown Law Journal 1204, 1216. The Note of the Advisory Committee on the Rules, 1966, to Rule 23, as revised, states:

> "Action * * * is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class."

In illustration: Two welfare applicants may properly bring a class action to enjoin enforcement of state statutes requiring

every applicant to have continuously resided for one whole year in the state immediately preceding his application, the class consisting of applicants who had not resided in the state for one year immediately past. *Johnson v. Robinson,* 296 F. Supp. 1165 (N.D. Ill. 1967). One teacher may be a proper representative of the class of prospective teachers for purposes of challenging a loyalty oath statute by injunctive relief. *Gilmore v. James,* 274 F. Supp. 75, 86 (N.D. Tex. 1967). An action by a Negro high school seeking admission into a high school athletic association is a proper class action in behalf of all high schools in the state who are or may become applicants for admission regardless of their racial composition. *St. Augustine High School v. Louisiana High School Association,* 270 F. Supp. 767 (E.D. La. 1967), affirmed *sub nom. Louisiana High School Association v. St. Augustine High School,* 396 F. 2d 224 (5 Cir. 1968). A suit under the Civil Rights Act by an employee challenging employment and promotional discrimination is, by the nature of the claim asserted, appropriate for class action under (b) (2). *Jenkins v. United Gas Corp.,* 400 F. 2d 28 (5 Cir. 1968). See: 3B Moore's Federal Practice 23-651, ¶23.40.

Considering the explicit terms of subdivision (b)(2) and the foregoing cases, it is clear that the named plaintiffs are entitled to bring this suit as a class action. It is so ordered.

It is further ordered that plaintiffs' motion for preliminary injunction shall be, and it is hereby, granted.

SIGNED and ENTERED this 9th day of October, 1970.

Original Signed By
Wm. Wayne Justice

UNITED STATES DISTRICT
JUDGE

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1775

JOE RICHARD LANSDALE, et al.,
Plaintiffs-Appellees,

Versus

TYLER JUNIOR COLLEGE, HARRY E. JENKINS, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Texas

(November 7, 1972)

ON PETITION FOR REHEARING

Before BROWN, Chief Judge, WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the

above entitled and numbered cause be and the same is hereby denied.

DYER, Circuit Judge, dissenting:

For the reasons stated in my dissenting opinion I dissent from the denial of the petition for rehearing.

GEWIN, COLEMAN, AINSWORTH and RONEY, Circuit Judges, dissenting:

For the reasons stated in the dissenting opinion of Judge Dyer, we respectfully dissent from the denial of the petition for rehearing.

APR 20 197
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1054

TYLER JUNIOR COLLEGE, HARRY E. JENKINS, EDWARD M. POTTER and EDWIN E. FOWLER,

Petitioners,

—v.—

JOE RICHARD LANDSDALE, PAUL HARDEN and L. H. HUTCHINSON, JR.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
22 East 40th Street
New York, N. Y. 10016

WILLIAM H. KUGLE, JR.
P. O. Box 152
Athens, Texas 75751

Attorneys for Respondents

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1054

TYLER JUNIOR COLLEGE, HARRY E. JENKINS, EDWARD M. POTTER and EDWIN E. FOWLER,

Petitioners,

—v.—

JOE RICHARD LANDSDALE, PAUL HARDEN and L. H. HUTCHINSON, JR.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Since *Ferrell* v. *Dallas Independent School District,* 392 F.2d 697 (5th Cir.), *cert. denied,* 393 U.S. 856 (1969), the Court has declined to review any of the school haircut cases brought here by petition for certiorari. With the exception of *King* v. *Saddleback Jr. College District,* 445 F.2d 932 (9th Cir.), *cert. denied,* 40 U.S. Law Week 3249 (Nov. 22, 1971), all of those cases involved students at secondary schools.

In several of those secondary school cases, the petitioners were represented by undersigned counsel. See, e.g., *Karr* v. *Schmidt,* No. 72-16, *cert. denied* 41 U.S. Law Week 3254 (Nov. 6, 1972); *Freeman* v. *Flake,* No. 71-956, *cert. denied,* 40 U.S. Law Week 3468 (March 27, 1972). We

thought then, and now, that certiorari should have been granted in those cases, not merely because of the stark split in the circuits, see *Freeman* v. *Flake, supra* at 3469, but also because the question whether compelled standards of dress and appearance in secondary schools involved, in our opinion, substantial constitutional issues concerning the right of privacy and freedom of expression of minors.

The case at bar, however, involves college students who are adults, and for that reason the decision below is correct and certiorari should be denied. Whatever the Court may think of the constitutional significance of rules which regulate the appearance of secondary school students, recent decisions of the Court are adequate to establish that the constitutional rights of college students on campus are to be recognized and enforced to the same extent as the rights asserted by adults in general off the campus. The Court in *Healey* v. *James,* 408 U.S. 169 (1972), explicitly so held: " . . . The precedents of this Court have no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" That constitutional perspective was re-asserted only a few weeks ago in *Papish* v. *University of Missouri,* 41 U.S. Law Week 3496 (March 19, 1973): " . . . the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech . . . "

Since it would be thought fatuous should anyone argue that the length of the hair of adults in the general population could be regulated by the criminal law, it must be con-

cluded that the regulation at issue in this case was properly declared unconstitutional.*

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
22 East 40th Street
New York, N. Y. 10016

WILLIAM H. KUGLE, JR.
P. O. Box 152
Athens, Texas 75751

Attorneys for Respondents

April, 1973

* Needless to say, it should be thought equally baseless if the general criminal law sought to regulate the length of the hair of minors. Thus, we have thought that the imposition of such a rule upon secondary school students, enforceable by disciplinary penalties, is constitutionally capricious. But it is unnecessary for present purposes to achieve perfect symmetry between the rights of minors and adults.